

OPINION
58-140

August 21, 1958 (OPINION)

INSANE, FEEBLEMINDED, ETC.

RE: State Hospital - County Mental Health Board -

State's Attorney As Member

This opinion is in reference to some recent correspondence you have had with this office and in which you request an opinion on the question of whether or not a state's attorney may serve as an appointed member of the County Mental Health Board.

Section 25-0215 of the 1957 Supplement to the N.D.R.C. of 1943 provides:

In the case of the temporary absence of an appointive member of the county mental health board or of his inability to act, the county judge shall call to his aid a licensed practicing physician or attorney, as the case may be, to replace such a member. . . . In the temporary absence of the county judge or in case of his inability to act, the state's attorney shall act as chairman, and in such capacity shall execute all the powers of the chairman. . . ."

It was first thought that this section, using the words "the county judge shall call to his aid" meant the county judge, acting in his official capacity as county judge, was to appoint new members to fill vacancies. In this instance, of course, the state's attorney, acting as chairman of the board, would be unable to fill vacancies by appointment, thus leaving a vacancy on the board had the state's attorney also been an appointive member.

In the case of State ex rel. Sathre v. Roberts, 67 N.D. 92, 107, the Supreme Court of North Dakota held that: "while the county judge is a member of the commission he does not act in a judicial capacity but simply as a member of the commission. . . . The county judge cannot order judgment because he is not acting as county judge but only as a member of the commission. . . ." The section so interpreted by the court has been repealed, but has been substantially reenacted by chapter 196 of the 1957 Session Laws of North Dakota.

Section 25-0315 of the N.D.R.C. of 1943 uses these words:

Each member of the insanity board, except the county judge, and the state's attorney while acting as chairman of the board if he is not already a member thereof shall be allowed five dollars per day. . . ." (Emphasis supplied).

This would clearly seem to indicate that the state's attorney may be an appointive member of the Board. However, when the section was amended (See section 25-0217 of the 1957 Supplement to the N.D.R.C. of 1943) the words "if he is not already a member thereof" were left

out. It would seem that the obvious purpose of the deletion of this phrase was to prevent the situation wherein a state's attorney who is a member of the board would get paid for services as chairman of the board, whereas the state's attorney who is not a member of the board does not get paid for his services as chairman.

In view of the position which the Supreme Court of North Dakota took in the above cited case of State ex rel. Sathre v. Roberts as to the capacity in which the county judge acts as chairman of the board, it is the opinion of this office that the state's attorney, while acting as chairman of the board, may appoint other members to fill vacancies on the board. Therefore, there is no objection to the state's attorney serving as an appointive member. In the event that he must act as chairman of the board, he may appoint someone to fill his vacancy, and there will be no danger of quorum not being present at the meeting.

If the situation arises, however, where according to statute the state's attorney would be required to substitute for the county judge as chairman of the board, he may not charge the county for compensation beyond that which is already included in his salary as state's attorney, since, as a member, he would be absent from the meeting. (See section 25-0217 of the 1957 Supplement to the N.D.R.C. of 1943).

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